83-321

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

HERBERT SHAFER
432 Delmont Dr., N.E.
Atlanta, Georgia 30305
(404) 266-8827

JAMES K. O'MALLEY
205 Ross Street
Pittsburgh, Pennsylvania 15219
(412) 391-7686

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether closure and exclusion of the public from portions of a defendant's trial for seven days, over the opposition of the defendant and without any showing by the prosecution that closure was necessary to achieve an overriding governmental interest, violates the Sixth Amendment to the Constitution of the United States.

2. Whether O.C.G.A. §16-14-7(f) (formerly Ga. Code Ann. §26-3405(d)(2)) facially violates the Fourth and Fourteenth Amendments to the United States Constitution, because it delegates to the police officers executing a search warrant unbridled discretion to search for and seize anything they choose to seize.

Subsumed under this question is whether the searches and seizures, as conducted in this case under the authority of that statute, were general.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Guy Waller, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia, entered on June 1st, 1983, and the denial of a timely motion for a rehearing, entered on June 28th, 1983.

OPINIONS BELOW

The Supreme Court of the State of Georgia entered its opinion affirming the Petitioner's convictions on June 1st, 1983. Petition for rehearing was denied on June 28th, 1983. A copy of the opinion, as yet unreported, is attached

as Appendix A. A copy of the Order denying the petition for rehearing is attached as Appendix B.

The decision of the trial judge of the Superior Court of Fulton County, Atlanta Judicial Circuit, granting the State's motion for closure was oral and unreported. A copy of portions of the transcript of the hearing held before the trial court at which the oral decision of closure was announced is set out in Appendix C. The State's motion for closure filed on June 14, 1982 is attached as Appendix D.

JURISDICTIONAL STATEMENT

Since this petition is being filed within sixty (60) days from June 28th, 1983, it is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Moreover, because the constitutionality of O.C.G.A. §16-14-7(f) (formerly Ga. Code Ann. §26-3405(d)(2)) is drawn in question, 28 U.S.C. §2403(b) may be applicable.

RAISING THE FEDERAL QUESTIONS

A. CLOSURE

After a jury was selected, it was excused in order that the court conduct a lengthy (7 days) evidentiary hearing on the Motion to Suppress wiretaps. Preliminary thereto, the court considered the state's motion (filed the week before) to close the courtroom during the evidentiary hearing. At the earliest possible moment petitioners' counsel "vehemently" opposed closure, "insist[ing] on our constitutional right to an open trial." S.T. 11.*

*S.T. ____, refers to the pagination of the Suppression Transcript.

Petitioners' counsel requested that, in any event, "several people who are vitally important to me" be permitted to remain in the courtroom in order to "effectively render assistance of counsel." (S.T. 12-13).

The court would not allow them to remain since they were not "officer(s) of the Court." (S.T. 13). And even though the state did not object to defense counsel's secretary remaining, she, too, was excluded. (S.T. 15).

The same constitutional claim was twice (on the direct appeal and on the petition for rehearing) asserted in the Supreme Court of Georgia. The federal constitutional claim was expressly denied by the Supreme Court of Georgia: "We find that appellants' Sixth Amendment right to a public trial was not violated." (App. A-5).

It is review of that denial which is here sought.

B. UNCONSTITUTIONALITY OF THE STATUTE

From the return of the indictment to the bitter end (the Petition for Rehearing), the Petitioners repeatedly and vigorously attacked then §26-3405(d)(2) Ga. Code Ann. (now O.C.G.A. 16-14-7(f)). In the Motion to Suppress, for example, the Petitioners said:

> (23) Searches conducted under the authority of §26-3405(d)(2), Ga. Code Ann. are violative of the Fourth and Fourteenth Amendments to the United States Constitution in that it authorizes unbridled seizures by the officers conducting the search without the interposition of judicial control or restraint.

The Supreme Court rejected the Fourth and Fourteenth Amendment attacks and held the statute constitutional facially (App. A-2) and as applied (App. A-3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law. . . .

STATUTE INVOLVED

O.C.G.A. §16-14-7(f) (formerly §26-3405(d)(2) Ga. Code Ann.), in pertinent part, provides:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to lawful arrest, search, or inspection *and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized* . . . (emphasis added).

REASONS FOR GRANTING THE WRIT

The first question presented by this petition requires the attention of this Court in order to ensure that rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution are not compromised by failure to comply with the principles of law this Court announced in *In re Oliver*, 333 U.S. 257, *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613, *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, and *Gannett Co. v. De Pasquale*, 443 U.S. 368.

That question deals with the right of an accused to a public trial – a right so firmly engrained in our notions of ordered liberty that it stands among the very few of the absolutes contained in the Bill of Rights to which this Court, despite the passage of nearly 200 years, has never squarely announced an exception. This Court recently said that "in *criminal trials* in particular" there is a presumption of openness harking back to "the time when our organic laws were adopted . . . both here and in England," *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613 (emphasis the Court's). That "presumption was so solidly grounded" at the time of this Court's decision in *In re Oliver*, 333 U.S. 257, that this Court was "unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country." *Globe Newspaper Co. v. Superior Court*, Idem, citing *In re Oliver* at 266.

Considering, then, "our long history of open criminal trials and the special value, for both public and the accused, of that openness," *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613 (O'Conner, J., concurring in the judgment), it would seem that a criminal trial may not be closed, in whole or in part, *over the defendant's objection*

unless closure is inescapably necessary to safeguard a state interest of the highest order, unless there are no less drastic methods available for pursuing that interest and unless it is clearly demonstrated that closure will guard against the perceived danger. See *Gannett Co. v. De Pasquale*, 443 U.S. 368, 441-42, (Blackmun, J., concurring in part and dissenting in part).

Although the court below identified a number of interests which, arguably, might be sufficient to justify closure, it swept aside this Court's carefully drawn, stringent procedural requirements announced in *Richmond Newspapers* as if they didn't count. As for the trial court, it conducted no hearing, no balancing act, articulated no findings, did not even consider *Richmond Newspaper's* procedural requirements; it simply slammed shut the courtroom doors and kept them closed for 7 days over petitioner's futile protests. (See S.T. 11-16, Appendix C).

The failure of Georgia's Supreme Court to apply *Richmond Newspaper's* procedural guidelines is troublesome because it creates uncertainty over the parameters of an important constitutional right in the context of the Sixth Amendment. To the extent that that uncertainty gives rise to the likelihood of erroneous decisions in future cases, its very existence is inconsistent with the Sixth Amendment.

ARGUMENT

A.

THE INTERESTS IDENTIFIED BY THE COURT BELOW WERE INSUFFICIENT TO JUSTIFY CLOSURE IN THIS CASE.

The Georgia Supreme Court held:

> In the hearing here, information was revealed

> which was potentially harmful to others, and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power ". . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe v. State*, 141 Ga. App. 433, 435 (233 S.E. 2d 807) (1977). We find that appellants' Sixth Amendment right to a public trial was not violated.

(Appendix A-4, 5)

Each of the goals articulated by the court below is certainly a worthy one. At the outset, however, the fundamental problem with the first three stems from their potentially limitless application and from their focus on concerns tangential to the central purpose of a criminal trial. The theory, for example, that "information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants," is not a theory which logically limits itself to this case. *Every* case *may* contain information potentially harmful to others; *every* case *might* prejudice other potential defendants. If the goals articulated by the court below were permitted to serve as the foundation for a closed trial, public trials soon would become a thing of the past.

Moreover, the central concern of a criminal trial is not the comfort or mental tranquility of others or the insulation of other potential defendants from prejudice. To say that is not to be callous or uncaring. Of course testimony in a case *may* be potentially harmful to others. Of course testimony in a case *may* tend to violate the privacy of others. Of course efforts should be made to mitigate the

unpleasant aspects of courtroom testimony. And of course efforts should be made to protect other potential defendants from prejudice. But the central object of a criminal trial is the execution of the most awesome responsibility the people have reposed in their government: The responsibility to determine whether a citizen should be stripped of virtually every right this nation was founded to protect, including the right to personal liberty or even the right to life. Because of the extraordinary concern of that object, all other concerns must necessarily come second. Given the critical role played by a public trial in the just execution of that central object, the only interest truly compelling enough to warrant closure is an interest in preserving the integrity of the trial itself. To the extent that the interests asserted by the court below have as their focus something else, they cannot provide a proper foundation for closing *any* criminal trial.

Even if one assumes for the moment that each of the interests articulated by the court below was sufficiently compelling to warrant closure over the petitioners' objections, the record in this case clearly demonstrates the dangers of closing a criminal trial based only on a prosecutor's jeremiad without the trial court making a precise and focused determination concerning whether closure is necessary to achieve a relevant interest, whether it represents the least restrictive method for doing so or whether it will be effective. Tested by these criteria, on the present record, none of these interests was sufficient to warrant closure.

The real mischief in this case lies in the fact that the court below simply created a catalogue of horrors which the trial court never envisioned, much less considered. Moreover, this record is devoid of *any* evidence showing

that the interests articulated by the court below were imperiled, or that closure was necessary to protect them.

No information potentially harmful to "others" was revealed; no information which would tend to violate the privacy of "others" was revealed; no information which "might prejudice other potential defendants" was revealed. The catalogue of horrors which the court below spoke of was merely a rhetorical device to quiet petitioners—sheer whimsy to justify a palpably bad decision.

Besides, unless the trial court was prepared to bar access to the courtroom to everyone, including the defendants, what was to prevent the defendants from disclosing whatever transpired in the courtroom? How did closure ameliorate this danger? The fact of the matter is that closure in this case could not assure privacy in any meaningful sense of the term; could not prevent disclosure of information "potentially harmful to others;" and could not prevent disclosure of information which "might prejudice other potential defendants."

Moreover, the record in this case will not permit a reasoned conclusion that the prosecution was concerned with any of these speculative problems. And the record is devoid of *any* evidence that any other prosecutions were at risk because of any evidence elicited during the closure.

Much of what has been said about the first three interests applies, with even greater force, to the fourth, fifth and sixth interests described by the court below, i.e., "to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." Appendix A-5.

To begin with, it's extremely doubtful, at least in this context, whether "generally to further the administration

of justice," is the kind of interest which is sufficient to overcome an accused's demand for a public trial. The thrust of this Court's opinions in *Globe Newspaper Co.*, *Richmond Newspapers* and *Gannett* would lead to precisely the opposite conclusion, i.e., that the sound and orderly administration of justice is furthered by the "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. A rule based on a contrary presumption certainly cannot withstand constitutional analysis.

The fourth interest identified by the court below, i.e., "to preserve order and decorum in the courtroom" has traditionally been preserved by the courts without closure, and, in this case, no one was indecorous.

The fifth, i.e., "to protect the rights of parties and witnesses," was never imperiled. Which parties needed protection? Which witnesses needed protection? From whom? From what? Why?

This Court has emphasized the historical importance of openness in assuring "that the proceedings were conducted fairly to all concerned, and [in discouraging] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. See also *In re Oliver*, 333 U.S. 257, 266-70. That being the case, it is apparent that arbitrary closure must inevitably damage the integrity of the judicial process and thus the justice in which that process results. See generally *Richmond Newspapers*, 448 U.S. at 569-73. To posit a "just" conviction following a secret trial is, in sum, to posit a contradiction in terms.

In summary, several of the interests identified are not the kinds of interests which may justify exclusion of the

public. And even if those interests may sometimes justify partial closure, this record is devoid of any facts showing a clear and direct nexus, or any nexus at all, between these interests and closure here or a showing that some other method would not have worked or even showing that closure would.

Conclusion

There simply is nothing in the record now before this Court which would lead to a reasoned conclusion that a danger to the just progress of the petitioners' trial, or even the interests possessed by anyone else, would have been presented by the attendance of the public.

Given the specific and focused guarantees of the Sixth Amendment, given the principles which underlie these guarantees and given the unbroken course of history during which these principles and guarantees uniformly have been observed, nothing short of the most compelling necessity imaginable should serve to support exclusion of the public from a criminal case. Certainly no prosecutor's mere unsupported request to remove certain portions of certain trials from the public view should warrant closing courtroom doors.

The judgment below should be reversed.

B.

THE STATUTE UNDER ATTACK

The statute under attack delegates to the police officers executing a search unbridled discretion; hence, it not only violates the Fourth Amendment's specificity and particularity requirements, it constitutes an impermissible delegation of the magisterial duty and function of determining, in advance, questions of probable cause and

laying out the permissible scope of the fruit to be gathered. The statute authorizes the officer executing a search to seize any property *he* "has probable cause to believe will be subject to forfeiture and will be lost or destroyed if not seized."

The statute, then, authorizes the executing officer not only to determine probable cause but dispenses with pre-search determination of specificity and particularity. This Court held almost eighty years ago that the warrant must describe the property to be seized with sufficient specificity and particularity, so that nothing is left to the discretion of the executing officer. *Marron v. United States*, 275 U.S. 192, 196. Where the warrant invites discretion, it fails for lack of specificity and is classified as general. See Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy*, 73 Dick. L.Rev. 1, 5-6 (1968).

Nor does this statute fit within any well-delineated exception to the rule that searches conducted outside the judicial process without prior approval are *per se* unreasonable under the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132. This statute simply permits general searches. *Morrison v. United States*, 275 U.S. 192. The warrants issued here authorized, generally, a search for gambling-related evidence. Armed with the statute, the executing officers embarked on an unconstitutional orgy of unique proportions. The trial court summed it up pithily: "Well, I'm taking the view that they went in and took everything in sight." (S.T. 638).

And the Georgia Supreme Court acknowledged that the officers seized "all manner of personal items, including jewelry, letters, school report cards, unopened strong boxes and other items which were then sifted at leisure by

the police in a search for evidence." (App. A-3.)*

After sifting through innumerable cardboard boxes loaded with seized items – items which the state conceded were benign, i.e., not crime-related, not of evidentiary value and not subject to forfeiture – in an act of uncommon benevolence (and, incidentally, to propitiate a visibly distressed trial judge (S.T. 634, 635)), the state offered to return the improperly seized items. The trial judge brusquely issued an order finding "that the boxes labeled Defendants' exhibits 250 through 259 contain *documents* which are personal and not crime-related. That speaks for itself." (S.T. 641-42). Alas, the Petitioner argued that because this was a general search everything seized should be suppressed if the exclusionary rule's deterrent principle is to have any practical meaning. Cf. *Kremen v. United States*, 353 U.S. 346. This argument was rejected by the trial court and the Georgia Supreme Court, since "[s]uch items as were unlawfully seized were excluded from evidence at trial pursuant to a motion to suppress." (App. A-3.) *Ergo*, that cured the evil of the general search and thus the admission into evidence of items particularly described in the warrant was ok. (App. A-3.)

This reasoning, however, is flawed. By failing to inform the magistrate of all the material facts, including the purpose of the search and its intended scope, the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the limits of the warrant.

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*The list of things taken is mind-boggling: gas and electric bills, cemetery deeds of ancient vintage, love letters, children's drawings, Christmas, Valentine and Easter cards, wedding portraits, group family photographs, credit reports, bank statements, bounced checks, credit applications and rejections, etc.

The search warrant issued here was not a general warrant on its face. The things to be discovered were described with particularity. The question is whether the search that was conducted, under the auspices of the statute, was not confined to the lawful scope and became general. Had the issuing judge been informed of the true reason for the warrant request and the scope of the search contemplated, he might have ok'd it, subject to explicit limitations on the scope of discovery to prevent an overly intrusive search. But the officers, relying on the statute's sweep, withheld that information, arrogating to themselves the magisterial function of setting out the dimensions of the search.

It is, of course, not the rule that only evidence uncovered during a search must invariably be described in the warrant before it may be seized. Where evidence is uncovered during a search pursuant to a warrant, the threshold question must be whether the search was confined to the warrant's terms. It may not be a general exploratory search. *Gurelski v. United States*, 405 F.2d 253, 258 (5th Cir., 1968). As executed here, the warrant became an instrument for conducting a general search. Under the circumstances, it was not possible to identify after the fact the discrete items of evidence which would have been discovered had the officers kept their search within the bounds permitted by the warrant; and therefore *all* evidence seized during this search under the auspices of this statute should have been suppressed. Accord, *United States v. Rettig*, 589 F.2d 418, 422-423 (9th Cir. 1978).

Throughout the constitutional challenge (e.g., Motion to Suppress and during the hearing on the Motion, S.T. 604-32, General Demurrer, Amended Motion for a New

Trial), it was argued that the word "property" in the statute, when construed to include private papers, presented the additional question of reasonableness. See *Boyd v. United States*, 116 U.S. 616. An examination of the books, papers and personal possessions in a person's home is an especially sensitive matter, calling for careful exercise of the magistrate's judicial supervision and control. See *Stanford v. Texas*, 379 U.S. 476. But, because of the statute's broad sweep, the officers didn't bother disclosing their intention; they simply arrogated to themselves the power to take whatever they wanted.

Conclusion

Even granting the enfeebled state of the Fourth Amendment, O.C.G.A. §16-14-7(f) (formerly Ga. Code Ann. §26-3405(d)(2) can't pass constitutional muster.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James K. O'Malley

JAMES K. O'MALLEY
205 Ross St.
Pittsburgh, Pa. 15219

Herbert Shafer

HERBERT SHAFER
432 Delmont Dr., N.E.
Atlanta, Ga. 30305

CERTIFICATE OF SERVICE

I, James K. O'Malley, one of Petitioner's attorneys of record, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court, I have this day served three true and correct copies of this Petition for Writ of Certiorari upon Respondent, by depositing three copies of this Petition in the United States Mail, with adequate postage and addressed to:

MICHAEL J. BOWERS
Attorney General
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334

H. ALLEN MOYE
Assistant District Attorney
Fulton County Courthouse
Seventh Floor
136 Pryor St.
Atlanta, Georgia 30335

This 25th day of August, 1983.

James K. O'Malley

JAMES K. O'MALLEY
Attorney for Petitioner

APPENDICES

APPENDIX A

In the Supreme Court of Georgia

Decided: June 1, 1983

39385. GUY WALLER ET AL. v. THE STATE.

CLARKE, Justice.

Appellants and others were indicted and charged with violation of the Georgia Racketeer Influenced and Corrupt Organizations Act (OCGA § 16-14-1, et seq.) and convicted of the offenses of commercial gambling and communicating gambling information. This appeal does not concern the sufficiency of the evidence except in regard to the question of venue.

The evidence at trial showed that appellants participated, with hundreds of others on a lower level, in a lottery ring which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange. The information was transmitted by telephone and telecopier and stored in a microcomputer maintained by appellant Cole.

(1) The basis of this court's jurisdiction is that appellant has made a facial attack on OCGA § 16-14-7(f) of the forfeiture provision of the Georgia Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO). The State argues that jurisdiction is not in this court because the constitutional challenge was not properly raised in the trial court and because appellants have no standing to raise the constitutionality of the forfeiture procedure since the evidence presented at trial was seized pursuant to search warrants. We find that the constitutional issue was properly raised at trial and that appellants have standing to raise it on appeal.

Appellants contend that the statute is unconstitutional because it authorizes seizure of "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity" prior to filing a complaint for a RICO in rem forfeiture proceeding and prior to the obtaining of a writ of seizure. Appellants insist that this statute is on its face violative of the Fourth Amendment to the United States Constitution.

We find that the provision in question, OCGA § 16-14-7 (f) is constitutional on its face. A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure or the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment. For a discussion of exigent circumstances, see New York v. Belton, 453 U.S. 454 (101 SC 2860, 69 LE2d 768) (1981); Chimel v. California, 395 U.S. 752 (89 SC 2034, 23 LE2d 685) (1969); Warden v. Hayden, 387 U.S. 294 (87 SC 1642, 18 LE2d 782) (1967).

Seizure of contraband, evidence, or weapons not listed on a search warrant by an officer executing an arrest warrant or search warrant does not violate the due process clause of the Fourteenth Amendment even though there

has been no notice and hearing. Calero-Toledo v. Person Yacht Leasing Co., 416 U.S. 663 (94 SC 2080, 40 LE2d 452) (1974). See also Fuentes v. Shevin, 407 U.S. 67 (92 SC 1983, 32 LE2d 556) (1972).

(2) The next question before us is whether the statute was applied in an unconstitutional manner as to appellants. According to appellants, officers acting under search warrants went far beyond the scope of the warrants in conducting general searches and seizing all manner of personal items including jewelry, letters, school report cards, unopened strong boxes and other items which were then sifted at leisure by the police in a search for evidence. Such items as were unlawfully seized were excluded from evidence at trial pursuant to a motion to suppress. It is appellant's contention that because certain property seized was outside the warrant, all of the evidence should have been suppressed. Appellants rely on Marron v. United States, 275 U.S. 192 (48 SC 74, 72 LE2d 231) (1927), United States v. LaVallee, 391 F.2d 123 (2d Cir. 1968), and United States v. Pinero, 329 F.Supp. 992 (S.D. N.Y. 1971), in support of their position. In Marron v. United States, the Court held that under the Fourth Amendment a search warrant describing intoxicating liquors and articles for their manufacture did not authorize seizure of a ledger and bills of accounts. However, finding that the ledger and bills were seized incident to a lawful arrest, the Court affirmed the appellant's conviction. In United States v. LaVallee and United States v. Pinero, the warrant did not describe the items at issue. Since the search was not conducted under any exception to the warrant requirement of the Fourth Amendment, the items not described in the warrant were suppressed. These cases stand for the rule that evidence improperly seized is inadmissible. There is no requirement that where

evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted.

(3) Appellants contend that their convictions should be overturned because the term of court at which they should have been tried under their demands for a speedy trial had expired. OCGA § 17-7-170(b) (formerly Code Ann. § 27-1901) provides: "If the person is not tried when the demand is made or at the next succeeding regular court term thereafter, provided at both court terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation." For demand to cause the time to begin to run there must be a jury impaneled and qualified to try the defendant. *DeKrasner v. State*, 54 Ga.App. 41 (187 SE 402) (1936). Here the trial court found that there was no jury impaneled to try the case during the term in which appellants filed their demands. Consequently, the time allowed by the two-term trial requirement did not begin to run until the term following that during which the demand was filed. In the absence of clear and convincing evidence to the contrary, we will not disturb the trial court's finding that no jury qualified to try appellants was impaneled during the term in which the demand was filed. *Wilson v. State*, 156 Ga.App. 53 (274 SE2d 95) (1980). See also, *State v. McDonald*, 242 Ga. 487 (249 SE2d 212) (1978).

(4) In their next enumeration of error appellants complain that the trial court erred in ordering the courtroom closed during the hearing on the motion to suppress. Appellants insist that this constitutes a violation of their rights under our holding in *R. W. Page Corp. v. Lumpkin*,

249 Ga. 576 (292 SE2d 815) (1982). In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power ". . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe v. State*, 141 Ga.App. 433, 435 (233 SE2d 807) (1977). We find that appellants' Sixth Amendment right to a public trial was not violated. There is some question whether state or federal law would have required that the wiretap information be revealed only in a closed courtroom. OCGA § 16-11-64(8); 18 U.S.C.A. § 2517. We need not reach this question since the thrust of appellants' argument is that the court failed to follow the procedure announced in *R. W. Page Corp. v. Lumpkin*, supra. This argument has no merit since the hearing in question occurred before that case was decided and before the procedural requirements set forth took effect.

(5) Appellants allege error in the admission of evidence gathered by electronic surveillance in counties other than Fulton County pursuant to warrants obtained in Fulton County and in the court's denial of appellants' motion to amend their motion to suppress to reflect facts in support of this allegation. Since we find that the amended motion to suppress was not timely made, we need not address the question whether the evidence should have been admitted. OCGA § 17-5-30 (former Code Ann. § 27-313) provides that a motion to suppress the fruits of an unlawful search and seizure shall be in writing and state facts showing that the search and seizure was unlawful. Although there

is no time limit set out in the statute for the filing of a motion to suppress, the statute has been interpreted as requiring that the motion be made before the issue is joined. *Perryman v. State*, 149 Ga.App. 54 (253 SE2d 444) (1979); *State v. Shead*, 160 Ga.App. 260 (286 SE2d 767) (1981). We interpret this to mean before the defendant enters his written plea. Although not controlling here, the federal wiretap statute provides that a motion to suppress the fruits of an illegal wiretap be made ". . . before the trial, hearing or proceeding unless there as no opportunity to make such motion or the person was not aware of the grounds of the motion." 18 U.S.C.A. § 2518 (10)(a).

In the present case the trial judge, after hearing, specifically found that the amended motion was made after issue was formally joined and without any showing of good cause. We find no error in the court's refusal to grant the motion to amend.

(6) Appellants assert that certain evidence which the state discovered through electronic surveillance pursuant to OCGA § 16-11-64 should not have been admitted in evidence because it had been disclosed to the Federal Bureau of Investigation, the Georgia Bureau of Investigation, the Organized Crime Prevention Council and the Internal Revenue Service. In support of this position, appellants point to OCGA § 16-11-64(b)(8), which limits the state's right to publish information obtained under an electronic surveillance warrant "other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant . . . ." The section then mandates that should a prohibited publication occur, the published information may not be admitted into evidence.

The state counters with the argument that no violation occurred here because federal law authorizes this type information be disclosed to other investigative or law enforcement officers to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. 18 U.S.C. 2517(1). The state also cites *Morrow v. State*, 147 Ga.App. 395 (249 SE2d 110) (1978), cert. den. 440 U.S. 917 (1979), and *Cox v. State*, 152 Ga.App. 453 (263 SE2d 238) (1979). In these cases the Court of Appeals held that the disclosure of such information to other law enforcement officers does not cause the information and evidence to be inadmissible.

In the case before us, the disclosure of the information was specifically authorized by a court order which cited both the state and federal statutes and listed the agencies to whom the disclosure could be made. The import of the order is that the superior court judge entering the order concluded that the sharing of information between law enforcement agencies was in fact necessary and essential to the preparation and actual prosecution for the crime specified in the warrant. In view of the fact that this prosecution is for violations of the statute aimed at organized crime, it is reasonable to find that organized efforts of law enforcement agencies are essential and necessary. This finding is supported by the clear language of OCGA § 16-14-2(b), which sets forth the intent of the General Assembly in enacting the RICO statute, to impose sanctions against "an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain." Our interpretation of the General Assembly's intent to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime is further borne out by a recent amendment to the RICO statute

authorizing reciprocal agreements with the chief prosecutors of any jurisdictions having substantially similar statutes. OCGA § 16-14-10(b), Ga.L. 1982, p. 1385, § 12.

(7) Appellants' seventh, eighth, ninth and tenth enumerations of error deal with appellants' claim that the state used straw "co-defendants" as informants at trial in spite of appellants' written demand before arraignment that the state disclose such information. The conversations between investigative officers and the informants were recorded and reviewed by the trial judge, who found that the tapes corroborated the testimony of the officers that no defense tactics were revealed and that no prosecutorial misconduct occurred. As the state points out, the only relief sought by appellants was disclosure of the informants. At the time of the hearing on the motion to suppress, the state indicated that the names of the informants had been disclosed and that the informants had been shown no special treatment. While we share the trial court's concern that the police tactics used here could lead to abuse, we find no error in his conclusion that no abuse of appellants' rights occurred in this case.

(8) Appellants complain that sworn oral testimony outside the affidavit was considered by the magistrate who authorized the wiretap. There is no merit to this enumeration since the magistrate issuing the search warrant may consider sworn oral evidence outside the affidavit to establish probable cause. *Simmons v. State*, 233 Ga. 429 (211 SE2d 725) (1975); *Cox v. State*, 152 Ga. App. 453 (263 SE2d 238) (1979). See also 18 U.S.C.A. § 2518(2). We decline counsel's invitation, as did the Court of Appeals in *Cox*, supra, to adopt Rule 4(c), F.R.Cr.P. which requires recordation of sworn oral testimony.

(9) The contention that the court erred in limiting

cross-examination of witnesses in the hearing in the motion to suppress is without merit. As the United States Supreme Court noted in Aquilar v. Texas, 378 U.S. 108, 109, n.1 (84 SC 1509, 12 LE2d 723) (1964). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." Although appellants also complain that the affiant was allowed to testify to the facts not in the affidavit, in fact, the record shows that affiants' testimony was limited to information presented to the magistrate.

(10) The trial court did not err in finding probable cause for the magistrate to issue the warrants despite certain mistakes of fact in the affidavit. There being sufficient information to support a finding of probable cause even discounting the mistaken information, the court did not err in finding that the affidavit was sufficient. Franks v. Delaware, 438 U.S. 154 (98 SC 2674, 57 LE2d 667) (1978).

(11) Following a recess in the suppression hearing a witness stated that before proceeding with his testimony he needed to clarify testimony given earlier. He stated that the review of his investigative report and his affidavit during the recess "cleared my mind." Defense counsel asked if the report were available, and the witness replied that it was not, that it was in the possession of the district attorney. Defense counsel moved for production of the report, and the court denied the motion. Appellants argue that they were entitled to see the investigative report from which the witness refreshed his recollection.

The rule in Georgia is that even had the witness had the report before him on the stand, the defendant could

not have procured the report as a matter of right simply by virtue of the fact that the witness used it to refresh his recollection. *Williams v. State*, 250 Ga. 664 (____ SE2d ____) (1983). "The defendant had no right to examine the witness' report which was used to refresh his memory and which was not in evidence." Id. at 665. See also *Jackson v. State*, 242 Ga. 692 (251 SE2d 282) (1978). It is true that this rule has been criticized as interferring with defendant's right to a thorough and sifting cross-examination. See dissent of Hill, C.J., *Williams v. State*, supra. However, in the present case, where the witness refreshes his recollection prior to taking the stand and has no notes in his possession, there can be no question that the state is under no greater compulsion to produce the report than if the witness had reviewed it before the trial began. In order for this report to be discoverable there must have been some reason other than the fact that it was reviewed by the witness.

(12) The enumeration of error regarding venue is deemed abandoned. Rules of the Supreme Court of the State of Georgia, Rule 45.

Judgment affirmed. All the Justices concur, except Hill, C.J., and Smith, J., dissent to division 3, Smith, J., dissents to division 5, Smith, J., and Weltner, J., dissent to division 6, Hill, C.J., and Smith, J., dissent to division 11. Gregory, J., concurs in the judgment and concurs specially in division 11.

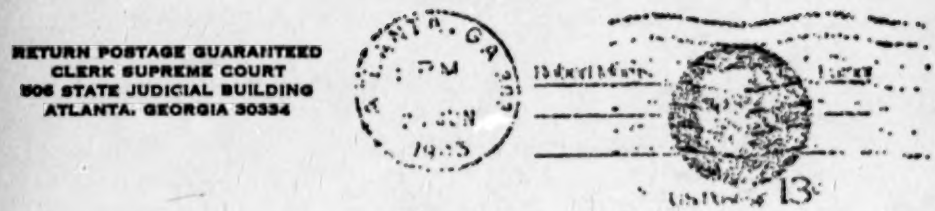
In the Supreme Court of Georgia

39385. WALLER, et al v. THE STATE

GREGORY, J., concurring specially.

I concur in the judgment in this case and specially in division 11. Where a witness on the witness stand uses a writing or any other thing to refresh his recollection, it ought to be subject to examination by opposing counsel. See Chief Justice Hill's dissenting opinion in *Williams v. State*, 250 Ga. 664, 668 (1983). However, where the writing or other thing is not available in the courtroom access by counsel must depend upon the rules of discocvery.

APPENDIX B



Herbert Shafer
ATTORNEY AT LAW
432 Delmont Dr
Atlanta, GEORGIA
30305

Clerk's Office, Supreme Court of Georgia

ATLANTA 6/28/83

The motion for a rehearing was denied today:

Case No. 39385, Waller et al. v. The State

Hill, C.J., Smith & Weltner, JJ., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

In the Supreme Court of Georgia

39385. WALLER v. THE STATE

HILL, Chief Justice, dissenting.

I dissent to division three (3) of the majority opinion. See *The State v. McDonald*, 242 Ga. 487, 489 (SE2d) (1978) (Hill, J. dissenting).

I also dissent to division eleven (11). See *Williams v. The State*, 250 Ga. 664, 668 (SE2d) (1983) (Hill, C.J., dissenting). There a minority of this court concluded that " . . . where a state's witness utilizes a report or other writing to refresh the witness' recollection, denying defense counsel the right to examine such writing constitutes a denial of the right of cross-examination." In my view, it makes no difference whether the witness uses the report to refresh his or her recollection while on the witness stand, or during a recess in the trial. The result is the same; the opposing party has been denied the right to a thorough and sifting cross-examination. This is particularly true where the district attorney shows the report to the witness, and the witness, with recollection thus refreshed, purports to "clarify" testimony given before the recess. The reference by the witness to the writing lends credibility to the "clarification", which opposing counsel is denied the opportunity to refute by reference to the writing. I therefore dissent.

I am authorized to state that Justice Smith joins this dissent.

APPENDIX C

TRANSCRIPT EXCERPTS OF CLOSURE COLLOQUY

MR. MOYE: Yes, Your Honor. The third matter, Your Honor, is a motion that the State has filed, filed on the 14th of June to close the courtroom to these proceedings. . . .

MR. MOYE: I do not ask that the trial be closed Your Honor. I seek only during the Motion to Suppress Hearing that the Hearing be closed.

THE COURT: Do you wish to be heard?

MR. SHAFER: Yes, Your Honor. Mr. Moye says that the purpose of this is to avoid any unnecessary publication. Well, there's been publication galore.

THE COURT: Now there might have been. But I can't make that judgment at this time.

MR. SHAFER: Well, in view of the unnecessary publication that has already been made and in view of my clients' constitutional rights to an open trial, we will not only not join in the Motion, we oppose it vehemently and we insist on our constitutional right to an open trial.

THE COURT: Insofar as the Motion is concerned?

MR. SHAFER: As far as every second of this trial.

THE COURT: Including the Motion?

MR. SHAFER: Including the Motion, yes, Sir.

THE COURT: All right.

MR. MOYE: Your Honor, as I understand the law, the right to a public trial is not unfettered, that it is in some respects within the discretion of the Court. Of course, this Court can close a courtroom to protect a witness as

this Court has done. This Court has much discretion on the matter.

THE COURT: All right, Sir I'm gonna grant your motion, but I want it understood now when we reach, if we do reach the trial of the case in chief, you have got an entirely different situation if you reach that point.

MR. MOYE: If we reach that point Your Honor, I would have to make a new motion. This covers only the motion hearing right now.

MR. SHAFER: Do I understand the Court is going to close these doors and deprive my client of public trial?

THE COURT: Yes, Sir, on the motion.

MR. SHAFER: Respectfully except. . . .

MR. SHAFER: I want to make a record, Your Honor. I have here several people who are vitally important to me, since I have no law clerk, who need to be at my beck and call so that I can have them run errands, so I can give them instructions to make telepone calls, obtain witnesses for me and to do any and all of the myrid of (sic) things that an attorney needs to do in order to effectively render assistance of counsel. One of them is my secretary and my wife. Another one is Mr. Evans and that is all at the moment. And I respectfully ask that they be permitted to stay.

MR. MOYE: I have no objection Your Honor, to Mr. Shafer's wife and secretary remaining. I do as to Mr. Evans. He is a part to a different set of proceedings, not to these proceedings at this time.

THE COURT: Is he a witness?

MR. MOYE: He's not a witness, he's not a party, he's not a lawyer.

THE COURT: What is his function? He's not an officer of the Court.

MR. SHAFER: No, he's not an officer of the Court. He's working for me. He's going to run errands for me.

APPENDIX D

[Filed in Office, June 14, 1982, Martha Nolan, Deputy Clerk, Superior Court, Fulton County, Georgia]

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE OF GEORGIA, *Plaintiff* vs. WALTER LEE EVANS, et. al., *Defendants*	INDICTMENT NO. A-59256

MOTION

Now comes THE STATE OF GEORGIA by the District Attorney for the Atlanta Judicial Circuit and files the within Motion and respectfully shows the court as follows:

1.

During the trial of the above-styled case, The State anticipates utilizing evidence derived from court-authorized electronic surveillance.

2.

Motions to suppress said evidence have been filed in the above-styled case and will be heard prior to or during the trial of same.

3.

During the hearing on the motions to suppress, The State, in order to validate the seizure of the evidence, must utilize evidence which may involve a reasonable expectation of privacy of persons other than those indicted in the above-styled case.

WHEREFORE, The State respectfully prays that any hearing on any motions to suppress evidence secured as a result of electronic surveillance, whether heard prior to or during the trial of the within case, in which evidence must be presented by The State, be closed to the public.

Respectfully submitted,

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

By: H. ALLEN MOYE
H. ALLEN MOYE
Assistant District Attorney

BENJAMIN H. OEHLERT, III
BENJAMIN H. OEHLERT, III
Assistant District Attorney

Attorneys for Plaintiff

Third Floor Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30335
(404) 572-2539